SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, ____

No. 73-224

ROBERT M. ROSE, M.D., DORIS D. ROSE,
Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

Petition For Writ Of Certiorari To The United States Court Of Appeals, Fifth Circuit.

ROBERT M. ROSE, M. D.
4440 Magnolia Street
New Orleans, Louisiana 70115
PRO SE

INDEX

	PAGE
PETITION FOR CERTIORARI.....	1
OPINIONS AND ORDERS BELOW.....	3
JURISDICTION.....	3
QUESTIONS PRESENTED.....	4
CONSTITUTIONAL PROVISIONS, STATUTE, CONGRESSIONAL EXPRESSION AND REGULATIONS INVOLVED.....	8
STATEMENT OF THE CASE.....	11
NECESSITY FOR GRANTING CERTIORARI.....	15
CONCLUSION.....	24

APPENDIX A

Judgment and Order of the United States District Court for the Eastern District of Louisiana, violating the mandate of FRCP Rule 56(e), applying res judicata to fraudulent facts and refusing to pass on the unresolved question of law presented by petitioner..... A1, A2

PAGE

APPENDIX B

The Judgment of the United States Court of Appeals for the Fifth Circuit, denying petitioner review of the violations of petitioner's Constitutional Right to Fair Trial and Due Process.. A3

APPENDIX C

The Judgment of the United States Court of Appeals for the Fifth Circuit, denying petitioner's Motion for Rehearing en banc..... A4

APPENDIX D

Congress' expressed intent at the enactment of sec. 213(e)(1)(A)(B) in 1954, from sec. 23(x)..... A5

APPENDIX E

Income Tax Regulation 1. 213-1 par. (iv) (v) showing the Commissioner's alterations of Congress' expressed intent..... A6

TABLE OF AUTHORITIES

Ball v. Reese, 58 Kan 614, 50 P875, 62 Am St. Rep. 638..... 23

Butcher v. J. I. Case Threshing Machine Co. (Tex Civ App) 207 SW 980;..... 23

PAGE

Garden City v. Merchants' and F. Nat. Bank, 65 Kan 345, 69 P 325, 93 Am St. Rep 284... 23

Handenschilt v Handenschilt, 129 W Va 92, 39 SE 2d 328..... 23

Howard v. U.S., C.A. Cal. 1967, 372 F. 2d 294, cert. den. 87 S. Ct. 2129, 388 U.S. 915, 18 L. Ed. 2d, 1356..... 22

King v. Emmons, 283 Mich 116, 277 NW 851, 115, ALR 564..... 23

National Labor Relations Board v. Ford Motor Co. C.C.A. 1940, 114 F. 2d. 905, cert. den. 61 S. Ct. 621, U.S. 689, 85 L. Ed. 1126..... 22

New Orleans v. Gaines (New Orleans v. Whitney) 138 U.S. 595, 34 L ed 1102, 11 S Ct 428..... 23

Nichols v Stevens, 123 Mo 96, 25 SW 578, 27 SW 613, 45 Am St. Rep. 514, affd 157 U.S. 370, 39L ed 736, 15 S Ct. 640..... 23

Pittsburgh SS Co. v. N.L.R.B., C.C.A. 6,1948, 167 F. 2d. 126, reversed on other grounds 69 S. Ct. 1283, 333 U.S. 656, 93 L. Ed. 1602..... 22

Robinson v. Phegley, 84 Or 124, 163 P 1166..... 23

Seubert v Seubert, 68 SD 195, 299 NW 873..... 23

PAGE

U.S. v Peck, D.C.D.C. 1957, 154 F. Supp. 603..... 22

U.S. v. Rosenberg, D.C.N.Y. 1952 108 F. Supp. 798, aff'd F. 2d. 666, cert. den. 73 S. Ct. 1131, 345 U.S. 1003, 97 L. Ed. 1403..... 22

Weil v. Defenbach, 36 Idaho 37, 208 P 1025..... 23

Welch v Mandeville (US) 1 Wheat 233, 4 L ed 79..... 23

30A Am Jur p. 399, 400..... 23

U.S.C.A., Const. Amend. 5, Note 46, p. 459..... 22

UNITED STATES CONSTITUTION
Amendment V.....2,7,8,15

UNITED STATES STATUTES
26 U.S.C. I.R.C. sec. 213(e)(1)(A)(B), 1954..... 10,14,18
26 U.S.C. I.R.C. sec. 23(x), 1939.... 14,18

REPORT OF THE COMMITTEE ON FINANCE TO ACCOMPANY H.R. 8300, 1954..... 4,9

REGULATIONS
Income Tax regulation sec. 1.213-1 par (iv)(v).....4,8,9,14,18

FEDERAL RULES OF CIVIL PROCEDURE
Rule 56 (e)..... 2,7,10,14

IN THE

SUPREME COURT OF THE UNITED STATES

October Term,

No.

Robert M. Rose, M. D.
Doris D. Rose
Petitioners

v.

Commissioner of Internal Revenue
Respondent

PETITION FOR CERTIORARI

Petitioner, Robert M. Rose, M.D., pro se, prays that writ of certiorari be issued pursuant to 28 U.S.C. sec. 2101(c) to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming, without hearing, the judgment of the United States District Court for the Eastern District of Louisiana, New Orleans Division, wherein the District Court (1) denied petitioner ruling on the controlling question of law on which his case is based, as to which there is substantial ground for difference of opinion and which has not been ruled on by any Court, ruling petitioner's case as "moot"

(2) failed to consider the sworn affidavits and documented facts of Suzanne's illness for those years before the Court (3) applied "res judicata" to fraudulent facts of Suzanne's illness "found" by a Tax Court for 1964, then held those fraudulent facts of Suzanne's illness for 1964 as being identical to the facts of her illness in the years 1967, 1968 and 1969 currently before the Court, ignoring that the sworn facts and affidavits as to Suzanne's illness for those years before the Court evidenced materially and completely different facts (4) violated the mandate of F.R.C.P. Rule 56(e) in denying petitioner's unopposed Motion for Summary Judgment (5) denied petitioner review of the new evidence, consisting of sworn affidavits and documented evidence presented by petitioner in his Motion for Summary Judgment, for permanent injunction of the Commissioner of Internal Revenue against continued exaction on petitioner, based on the 1964 Tax Court decision, adverse to petitioner, wherein the Tax Court "found" false and, therefore, fraudulent facts and falsely averred that its fraudulent facts had been stipulated, when in truth and in fact they had not been, all of which evidenced prejudicial bias, violated petitioner's right to fair trial and to "due process" as guaranteed to him by the Fifth Amendment to the United States Constitution, particularly since the true facts and merits of petitioner's case before the Tax Court for 1964, and the law arising therefrom would have resulted in decision favorable to petitioner.

OPINIONS AND ORDERS BELOW

The Judgment of the District Court, denying petitioner's Motion for Summary Judgment, which was unopposed as mandated by F.R.C.P. Rule 56(e) and denying ruling on the controlling question of law on which petitioner's case was based, as to which there is substantial ground for difference of opinion, by ruling petitioner's case "moot", affirming false and fraudulent facts of a 1964 Tax Court as "res judicata", and as identical to facts in 1967, 1968 and 1969 when sworn affidavits affirmed otherwise, denied petitioner fair trial and his right to due process as guaranteed to him by the Fifth Amendment to the United States Constitution, is attached hereto as Appendix A.

The Judgment of the United States Court of Appeals for the Fifth Circuit, denying petitioner's request for review, under 28 U.S.C. sec. 1291, is attached as Appendix B.

The Judgment of the United States Court of Appeals for the Fifth Circuit, denying petitioner's motion for re-hearing by the Court "en banc", is attached as Appendix C.

JURISDICTION

The Judgment of the Court of Appeals, denying petitioner's request for review was dated February 26, 1973 and was entered on February 26, 1973. The Decision of the Court of Appeals,

denying petitioner's Motion for Re-hearing En Banc was dated May 21, 1973 and was entered on May 21, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 2101(c). The power and jurisdiction of this Court to review the Judgment and Decisions of the Court of Appeals and the District Courts are so established as not to require citation.

The special and unusual circumstance which warrant exercise by this Court of its discretionary power to issue the writ of certiorari here requested are set forth later in this petition.

QUESTIONS PRESENTED

1) Are court findings and decisions on the deductions allowed on income taxes of the medical costs of treating deadly illness caused by air pollution, as was the illness of this case, a matter of legitimate and substantial public interest, since both air pollution of cities and such illness are rapidly increasing, and all taxpayers faced with similar illness are affected by decision thereon?

2) Does comparison of Congress' expressed intent, Rept. Comm. Fin. U.S. Senate to accompany H.R. 8300, p 219, 220, with the Commissioner's regulation 1.213-1(iv)(v) show identical wording, punctuation and meaning, or has the Commissioner, in his regulations, made any alteration whatsoever of Congress' expression?

3) Has the Commissioner of Internal Revenue the legal right to make any alteration whatsoever, in his regulations, of any statement made by Congress?

4) Is there a precedent of allowing income tax deduction of costs of food and lodging when a person is required to be away from his home?

5) Since costs of food and lodging directly occasioned by the treatment of illness are allowed medically deductible by statute but are denied by regulation, and since in forming his regulation, the Commissioner has undeniably altered the wording and the meaning of Congress' expressed intent in this regard, is the issue of the Commissioner's alterations a question of law proper for court determination, particularly since no court has yet ruled on this issue and it is unresolved?

6) Is it the standard of practice of all Federal District Courts, all Courts of Appeal, and the Supreme Court of this land to rule cases "moot" when issues and questions of law raised therein have not been resolved?

7) Did the District Court err when it ignored the controlling question of law at issue, in petitioner's case, as to which there is substantial ground for difference of opinion, which is new and which has not been passed on by any court, by ruling petitioner's case "moot", leaving this issue still unresolved?

8) Is it the standard practice of all Federal District Courts, all Courts of Appeal and the Supreme Court of this land to apply "res judicata" to false facts, thereby fixing false facts as legal truth?

9) In income tax litigation, do the facts of each year apply just to the year in which they occurred, or can the facts that occurred in one year be applied as having occurred in another year?

10) Was the District Court in error when it affirmed fraudulent facts of a prior year "found" by a Tax Court, which facts were documentarily evidenced as false in petitioner's unopposed Motion for Summary Judgment, before the Court; did apply "res judicata" to those fraudulent facts, and certified those facts as having been identical to the facts of those years currently before the Court, disregarded and ignored the sworn affidavits as to materially different facts of those years, before the Court, contained in petitioner's Motion.

11) Since it is established "from the facts . the law arises", can fair trial and full justice unquestioningly derive when fraudulent facts are "found" by a court, and the court's opinion and decision are based thereon?

12) Is it the standard practice of the Federal District Courts, the Courts of Appeal and the Supreme Court of this land to aver that facts "found" by the court had been stipulated, when in truth and in fact they had not been ?

13) Did the District Court err in denying the mandate of F.R.C.P. Rule 56(e) by dismissing petitioner's Motion for Summary Judgment, when the documents and sworn affidavits of that Motion were in full compliance with F.R.C.P. Rule 56(e) and were unopposed as mandated by Rule 56(e)?

14) In a civil case, after all legal paths for relief from action by a court wherein fraud and illegality exist, and litigant has been denied fair trial and due process, as guaranteed to him by the Fifth Amendment to the United States Constitution, does petition or suit for permanent injunction remain?

15) Did the District Court, and subsequently the Court of Appeal, deny petitioner fair trial and due process, as guaranteed to him by the Fifth Amendment to the United States Constitution, by ruling petitioner's case "moot" when the main issue of law raised was, and still is, unresolved, by affixing "res judicata" to false facts of a prior tax year, then holding those facts as having been identical to the facts of the subsequent years before the court; ignoring the sworn affidavits of materially different facts of those years before the Court; by denying the mandate of F.R.C.P. Rule 56(e) that judgment shall issue, and by disregarding petitioner's unopposed Motion for Summary Judgment, when the form of opposition is also mandated by F.R.C.P. Rule 56(e)?

16) Does the Commissioner's Income Tax Regulation 1.213-1(iv) deny medical deduction of costs of food and lodging essential to the treatment of specific illness, or are those costs denied only when incurred "for the general improvement of a taxpayer's health"?

CONSTITUTIONAL PROVISION, STATUTE, CONGRESSIONAL EXPRESSION, AND REGULATIONS INVOLVED.

The Constitutional provision involved is the Fifth Amendment to the United States Constitution,

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or navel forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." U.S. Constitution, U.S.C., 1970 Ed., Titles 1-7, Article(V), p. xlviii.

The expression of Congress' intent involved is from the Report of the Committee on Finance, U.S. Senate, to accompany H.R. 8300, appended as Appendix D. The sections that were removed from context and altered by the Commissioner in his regulations are:

1. "***and the travel is prescribed for reasons other than the general improvement of a patient's health, "*** (emphasis added)

2. "The subsection is not intended otherwise to change the existing definitions of medical care *** nor to deny the cost of food and lodging provided as part of a hospital bill."

The Income Tax Regulation involved is sec. 1.213-1 par. (iv)(v), appended as Appendix E.

The Commissioner has altered Congress' expression 1) and 2) above so that they read:

1)" On the other hand, if the travel is undertaken merely for the general improvement of a taxpayer's health ***" (emphasis added)

2) "The cost of in-patient hospital care (including the cost of meals and lodging therein) is an expenditure for medical care."***

The Statute involved is sec. 213(e)(1)(A)(B) of the 1954 I.R.C., Subtitle A, Ch. 1 B, Part VII

Sec. 213(e) DEFINITIONS. - For purposes of this section.

(1) The term "medical care" means amounts paid.

> (A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body,
>
> (B) for transportation primarily for and essential to medical care referred to in subparagraph (A), or

F.R.C.P. 56(e) is the Rule involved, and is appended as Appendix F.

The relevant section of this rule is:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

STATEMENT OF THE CASE

This is a suit for the recovery of income taxes paid by petitioner on expenses of his daughter's illness during the tax years of 1967, 1968 and 1969. Deductibility of these medical expenses was denied by the Commissioner and paid by petitioner. After the statutory six months had elapsed during which the Commissioner failed to reply to petitioner's protest, petitioner filed suit in the United States District Court for the Eastern District of Louisiana, at New Orleans, which had jurisdiction under 28 U.S.C. sec. 1340.

In those tax years before the District Court, petitioner's daughter, Suzanne, suffered recurrence of respiratory obstructive disease which culminated in attacks of convulsions and coma on each occasion that she was returned to her home in New Orleans, from Sarasota, Florida. She was at death's door with each attack. So that her condition would be alleviated and that she could remain alive, she was returned to Sarasota, Florida following the failure of each trial of her ability to survive in New Orleans.

Suzanne's illness began acutely in 1964, when she was ten years old and was such that she could not live in New Orleans without continuing respiratory obstruction, culminating in deadly recurrent attacks of convulsions and coma. All medical treatment and recurrent hospitalization at New Orleans failed to relieve progression of her illness. To mitigate her disease and to prevent recurrence of the convulsive-coma seizures, petitioner has been obliged to maintain Suzanne,

with her mother, Doris, in attendance as nurse and companion, at Sarasota, Florida. Suzanne is alive today only because she has been maintained outside of the New Orleans area.

In short, pollution of the atmosphere of the City of New Orleans, to which Suzanne was sensitive, caused Suzanne's illness in 1964, and was complicated by the superimposed extensive staphylococcal bronchial infection from which she suffered and slowly recovered during 1965 and 1966, which has left her lungs permanently, diffusely scarred.

Each time that Suzanne was returned to New Orleans during 1967, 1968 and 1969, obstructive respiratory symptoms culminating in attacks of convulsions and coma recurred, and were relieved and prevented by removing Suzanne from New Orleans and returning her to Sarasota, proving conclusively that her illness was caused, and continued to be recurrently caused, by pollution of the atmosphere of New Orleans.

Because of a prior, very ugly action by a Tax Court, petition for issuance of permenent injunction against the Commissioner of Internal Revenue was raised in this case and is also at issue. Jurisdiction of the District Court over this issue is established by 28 U.S.C. sec. 1346(a)(1) and is not barred by 26 U.S.C. sec. 7421, since "extraordinary circumstances" and illegality" exist.

The Tax Court, after hearing on the facts of Suzanne's illness during 1964, disregarded the competent, uncontradicted medical testimony presented, "found" a false and, therefore, fraudulent history of Suzanne's illness in its findings of fact and opinion, wherein was omitted all note that recurrent attacks of convulsions and coma, and that Suzanne was at death's door with each attack, was the outstanding feature of her illness. The Court also omitted that all treatment and hospitalization at New Orleans failed to prevent the recurrence of these attacks, and that finally, after all other treatment had failed, the only remaining treatment, moving Suzanne to another clime, halted the recurrence of her convulsive attacks. Specifically, Suzanne could not live in New Orleans and would have died had she been kept here.

The Tax Court's false history of her illness records only that Suzanne suffered from "asthma", which is the initial, working diagnosis made by doctors in all cases of obstructive respiratory disease, omitted, as stated above, all note that recurrent, deadly attacks of convulsions and coma, which are not at all a usual feature of just "asthma", were the outstanding, alarming, features of her disease, omitted note that removing her to Destin, Florida, resulted in immediate amelioration of her illness and returning her to Bristow Towers, an environment other than her home, in New Orleans, resulted in progression of her illness, establishing beyond all doubt that Suzanne's illness was caused by pollutants in the atmosphere of New Orleans, and was relieved by removing her from those pollutants.

All of the foregoing facts appear in the undisputed documents and sworn affidavits of the principals involved and are in petitioner's Motion for Summary Judgment presented to the District Court under F.R.C.P. Rule 56(e).

From the statutory fact that costs of food and lodging essential to the treatment of specific, continuing illness necessary to maintain a sick person in an environment away from home, while the expense of maintaining the home continues, were allowed as deductible medical expense by IRC sec. 23x of the 1939 Income Tax Code and were not denied by Congress when sec. 23x was revised to sec. 213(e)(1)(A)(B) in 1954, and, actually, are not denied by the Commissioner in his regulations, petitioner filed suit in the District Court for recovery of the taxes that the Commissioner had demanded and that petitioner had paid.

The controlling question of law of petitioner's case before the District Court, which is the Commissioner's undeniable and unquestionable alterations of Congress' expressed intent, at the enactment of the 1954 revision, has substantial ground for difference of opinion and has not been passed on by any Court. The result of the Commissioner's alterations is that the expenses of food and lodging that petitioner had claimed and which are allowed medically deductible by statute, IRC sec. 213(e)(1)(A)(B), are denied by the Commissioner's regulation sec. 1.213-1.

This controlling question of law is still unsettled and litigation over this issue is incomplete, for the District Court evidenced prejudi-

cial bias in ignoring and not ruling on this question of law by declaring petitioner's case "moot", thereby leaving this issue unresolved.

On appeal from the Judgment of the District Court, the Court of Appeals affirmed the Judgment of the District Court without hearing, under their local Rule 21, and also denied petitioner's application for rehearing en banc, thereby also denying petitioner fair trial, or even semblance of Justice, for proper consideration of the true and full facts of Suzanne's illness for those years before the District Court, together with consideration of the question of law on which petitioner's case was based, that is, the Commissioner's undeniable and unequivocal alterations of Congress' expressed intent in his regulations, and the fact that the regulations actually do not deny the costs of food and lodging essential to the treatment of specific illness, could only result in decision favorable to petitioner.

NECESSITY FOR GRANTING CERTIORARI

This Court is petitioned for writ of certiorari in this case because of the legitimate public interest and substance of the question of law presented and because of the prejudicial bias of the lower courts and their rank injustice in the course of this litigation by which petitioner has been repeatedly denied fair trial, due process and his day in Court as guaranteed to him by the Fifth Amendment to the United States Constitution.

Public interest is substantially involved in this case, in that for the first time, the Courts are presented with the question of law of the Commissioner's alterations of Congress' expressed intent, and that by altering Congress' expressed intent the Commissioner has managed to legislate denial to all taxpayers of income tax medical deduction of costs of food and lodging in connection with any, every and all illness, regardless of circumstances, except when the sick person is in any hospital, anywhere and at any time, which was never envisioned or expressed by Congress. The Commissioner, by his legislation, has also managed to discriminate in favor of the very rich in that they can afford very prolonged hospital stays of years on end and do avail themselves of such stays, that the less affluent cannot begin to afford, the rich having then the unquestioned full income tax deduction of the costs of food and lodging involved, since those costs are an integral part of a hospital bill and cannot be separated therefrom.

Petitioner's daughter's illness consisted of sensitivity to toxic pollutants in the atmosphere of New Orleans, pollutants that made life untenable for her in those environs. Her illness happened to occur just a few years before the public's present awareness and increasing deep concern over the pollution of the atmosphere of their cities, pollution that is now widely recognized and is reaching levels toxic for many, causing illness and death, and which can only be avoided by those individuals, unfortunately sensitive, who are able to subsist in other locales.

Common sense indicates that it is not always possible or practical for entire families to make such moves due to the illness of one member of the family.

The current pollution of the atmosphere of our cities is not being brought under control, it is increasing and there is an increasing number of individuals who, in order to avoid illness, and in some cases, even to survive, will have to move or be moved to other locales, as occurred in Suzanne's illness and as it was testified to the 1964 Tax Court.

Public awareness that their income tax laws contain provisions allowing relief from the costs of treatment of such illness derives from news publications of releases based on court findings and decisions. That the Commissioner has altered Congress' expressed intent in forming his regulations and has thereby denied taxpayers tax relief allowed by law and envisaged by Congress, is in the process of litigation has been concealed and withheld from public knowledge by the fact that all public information dealing either with fact or with law originates from the Court's findings and opinion.

When those findings present a false and, therefore, fraudulent account of the illness concerned and avoid comment or holding on the question of law concerned, as the 1964 Tax Court did, in this case, the issues are not only unresolved, but the news releases resulting from the court's opinion present such a false picture to the public that they are denied awareness of what has really transpired or is transpiring, as well as violates the Court's legal responsibility to speak the truth.

There is a voluminous and ever increasing mass of litigation resulting from the discrepancy between the medical expenses clearly allowed deductible by IRC sec. 213(e)(1)(A)(B) and the denial of those deductions by the Commissioner in his regulations 1.213-1 and this mass of litigation will increase until, eventually, this Court rules on the Commissioner's undeniable, incontestable alterations of Congress' expressed intent at the time of its enactment of IRC sec. 213(e)(1)(A)(B) in 1954, from its predecessor section 23x, and reaffirms that Congress has never denied costs of food and lodging as income tax deductible medical expense, when those costs were clearly and solely occasioned by the treatment of illness, when the illness could not have been treated without those costs, and when those costs were in addition to the taxpayer's continued maintenance of his household.

The principle of allowance of income tax deductibility of costs of food and lodging when taxpayers are obliged to be away from their home or to maintain homes away from their home, is not new. Workers who must travel have such allowance, Congressmen have a carte blanche $3,000 yearly income tax allowance for such expenses and even Federal judges have a per diem allowance.

There is no question but that had I maintained Suzanne in a hospital at Sarasota, Florida for the years before the Court, all costs of the food and lodging of those years of hospitalization, which would have been far in excess of the actual costs concerned, would have been fully and unquestioningly deductible as medical expense on my income tax returns, for they would have been an integral

part of the hospital bills submitted, I simply could not afford handling Suzanne's illness in that fashion. The problem of maintaining Suzanne in Sarasota was done in a manner better for her, and at lesser cost to me, yet the Commissioner's regulations are used to deny me, and every taxpayer faced with the costs of similar illness, the medical deductibility of the expenses of food and lodging mandated by medical treatment, when, actually, the regulations do not deny those costs when they are incurred in the treatment of specific illness.

It is documentarily evidenced by the transcript of the hearing, which is in petitioner's Motion for Summary Judgment, that the Tax Court was itself unfair and denied petitioner fair trial, due process and justice, by ignoring and disregarding the sworn facts before it, and by substituting and "finding" a false and therefore fraudulent account of Suzanne's illness, almost identical to one composed by the Commissioner's attorneys prior to the Tax Court hearing and on which they had sought to force stipulation.

The Tax Court then falsely and, therefore, fraudulently averred that its fraudulent findings had been stipulated when in truth and in fact they had not been. The Tax Court then fitted its fraudulent findings into the mold of another case, ignored and did not pass on the controlling question of law raised by petitioner and on which his case was based, and made decision adverse to petitioner, that decision based on a regulation in conflict with statute and, therefore, void.

Those acts of the 1964 Tax Court violated all principles of fair play, made the court hearing a procedure of sham, and denied petitioner fair trial and due process as guaranteed to him by the Fifth amendment to the United States Constitution. All appeal paths from that Tax Court decision were exhausted without relief. Although appealed to this Court, it was not reviewed by this Court, petitioner's Petition for Certiorari "disappearing" in the United States Mails for almost two weeks, being received by this Court and rejected for review as having been filed out of time. Petition for extension of time for filing, made by petitioner to this Court after he became aware of the failure of the U.S. Mails to provide the reasonable delivery service that it should have provided, was rejected

The District Court evidenced prejudicial bias when it failed to examine the unopposed documented facts and sworn affidavits of petitioner's Motion for Summary Judgment, and denied petitioner fair trial and due process in violating the mandate of F.R.C.P. Rule 56(e)

> "*** When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

In ruling petitioner's case "moot" when it presented unresolved issues and questions of law on which his case was based and as to which there is substantial ground for difference of opinion, the District Court and, subsequently, the Court of Appeals, disregarded basic principles of fair play, due process and justice, consistently announced by this Court, consistently followed and applied by numerous other District Courts and by the United States Courts of Appeal, as well as numerous State Courts, in that "fair trial", "due process" and "day in court" do not infallibly and automatically obtain when the mere physical form of a trial or hearing has been followed, or that since the physical frame of a hearing was conducted, that "justice" invariably and immutably resulted therefrom and was forever beyond question or correction, regardless of new evidence or circumstance.

It should not require citation that all Courts have held that "justice is more important than consistency." In this case, justice has clearly been precluded by the judges' prediliction to consistency.

Petitioner's petition that the 1964 Tax Court decision be vacated because of fraud by the Court and that permanent injunction be issued against any exactions on petitioner by the Commissioner, based on that Tax Court decision is authorized by 28 U.S.C. sec.1346(a)(1) and is not barred by 26 U.S.C. sec. 7421 since "extraordinary circumstances" and "illegality" exist, and is clearly not attempt to relitigate the 1964 Tax Court hearing, as the Commissioner's attorneys reiterate.

22 As Habeas Corpus protects the criminal against unfair, unconstitutional acts by Courts, Permanent Injunction, after all legal paths for redress in civil litigation, have been exhausted, as they had been in the 1964 case, exists for the final, ultimate protection of a civil litigant against a court having functioned as an instrument of injustice, and should be issued in this case.

All Courts have held that a Court's findings, opinions and decisions should never be arbitrary, capricious or unreasonable and that basic Constitutional liberties should not be violated thereby.

"Due process requires compliance not only with the outward form of the law but in all that is implicit in the concept of ordered liberty and with the immutable principles of justice".[1] "Due process of law demands that the law should not be unreasonable, arbitrary or capricious".[2] "The *** courts ***cannot impose a standard ***or insist upon a rigid formula which serves only to defeat basic constitutional liberties".[3] "A trial by a biased judge is not in conformity with due process of law".[4] "Due process is denied where the procedure tends to shock the sense of fair play."[5]

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[1](U.S. v. Rosenberg, D.C.N.Y. 1952 108 F.Supp. 798, aff'd 200 F.2d. 666, cert. den. 73 S.Ct. 949, 951, 345 U.S. 965, 97 L. Ed. 1384, rehearing den. 73 S.Ct. 1131, 345 U.S. 1003, 97 L.Ed. 1403).

[2](U.S.C.A., Const. Amend. 5, Note 46, p. 459).

[3](U.S. v. Peck, D.C.D.C. 1957, 154 F.Supp. 603).

The District Court was also in error in that it is established without need of citation, that in income tax cases each year is its own year, each year is separate and the facts of a prior year apply only to that year and cannot be applied as having occurred in a different year.

The District Court evidenced prejudicial bias, was in gross error, and denied petitioner his Constitutional right to fair play, due process and justice by applying "res judicata" to this case before it, on basis of the 1964 Tax Court's findings, opinion and decision. "The principles of res judicata cannot be invoked to sustain fraud,"[6] and "A judgment obtained by fraud or collusion may not be used as a basis for the application of res judicata"[7]

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[4](National Labor Relations Board v. Ford Motor Co. C.C.A. 1940, 114 F.2d. 905, cert. den. 61 S. Ct. 621, 312, U.S. 689, 85 L.Ed. 1126) and Pittsburgh SS Co. v. N.L.R.B., C.C.A. 6, 1948, 167 F.2d. 126, reversed on other grounds 69 S.Ct. 1283, 333 U.S. 656, 93 L.Ed. 1602)

[5](Howard v. U.S. C.A. Cal. 1967, 372 F.2d. 294, cert. den. 87 S.Ct. 2129, 388 U.S. 915, 18 L. Ed. 2d. 1356) and the other numerous citations of U. S.C.A., Constitution, Amendment 5, Note 14, p. 434 and Note 15, p. 435, 436 and 437.

[6](30A Am Jur p. 399, 400). (Garden City v. Merchants'and F. Nat. Bank. 65 Kan 345, 69 P 325, 93 Am St. Rep 284)(Handenschilt v Handenschilt, 129 W Va 92, 39 SE2d 328).

CONCLUSION

Public awareness of the rapidly increasing incidence of illness, and even death, caused by regional air pollution, makes this case of public concern since the Public has the right to be informed that a case of illness bordering on death, caused by atmospheric pollution, is being litigated in the Federal Courts and there is pending an unresolved question of law concerning the income tax deductibility of costs of food and lodging occasioned by the treatment of that illness.

This case is of substantial public interest in that the question of law presented is the Commissioner's undeniable alterations of Congress' expressed intent, whereby the Internal Revenue Service and all courts deny income tax deductibility of medical costs of food and lodging essential to

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[7] (New Orleans v. Gaines (New Orleans v. Whitney) 138 U S 595, 34 L ed 1102, 11 S Ct 428; Welch v. Mandeville (US) 1 Wheat 233, 4 L ed 79; Weil v. Defenbach, 36 Idaho 37, 208 P 1025; Ball v. Reese, 58 Kan 614, 50 P 875, 62 Am St. Rep. 638; King v. Emmons, 283 Mich 116, 277 NW 851, 115 ALR 564; Nichols v Stevens, 123 Mo 96, 25 SW 578. 27 SW 613, 45 Am St Rep 514, affd 157 US 370, 39L ed 736, 15 S Ct 640; Robinson v. Phegley, 84 Or 124,163 P 1166; Seubert v Seubert, 68 SD 195, 299 NW 873, Butcher v J. I. case Thershing Machine Co. (Tex Civ App) 207 SW 980;

the treatment of specific illness, which ignores that the Commissioner's own regulation only denies the costs of food and lodging when those costs are "for the general improvement of a taxpayer's health."

Congress has only denied food and lodging as deductible medical expenses when those costs have been concerned with "the general improvement of a patient's health". Congress has never denied deductibility of costs of food and lodging when those costs were required for the medical treatment of a specific illness as, in this case, a patient had to be maintained in an environment other than that of the home area to avoid deadly illness caused by atmospheric pollution of that home area.

Throughout the course of this litigation, the lower courts have misrepresented the true facts and nature of this case and have denied petitioner, and thereby the Public, decision on the main question of law on which this case rests and which is of substantial interest to all taxpayers faced with similar illness, since they are affected thereby.

It is understandable that one court hesitates to assign error to another court, yet the purpose and function of appeal is to correct error and violation of Constitutional Right by the courts below. That the findings and opinions of the lower courts have, in the course of this litigation, disregarded sworn, uncontradicted testimony, have substituted false accounts of the nature of the case and have ignored and not resolved the issue of law involved, not only conceals factual knowledge which is of substantial interest to the

Public, from the Public, but the courts involved have so far departed from the principles of justice, fair play and due process followed by all other courts, that it has become incumbent on this Court of last Appeal to grant certiorari to this case, to settle this unresolved question of law, and to vacate, or reverse the judgment and opinions of the lower courts concerned, that this be indeed a Government of Law and not of men, and that the Constitutional and Legal rights of the Public be affirmed, by this Court upholding the Constitutional and Legal Rights of the individual, the petitioner in this case.

Respectfully submitted,

Robert M. Rose, M.D., Pro Se
4440 Magnolia Street, Suite #312
New Orleans, Louisiana, 70115

Date: _____

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

ROBERT M. ROSE, M. D. and DORIS D. ROSE — Civil Action

No. 72-0165

vs — Section "H"

THE COMMISSIONER OF INTERNAL REVENUE

JUDGMENT

This cause came on for hearing on April 5, 1972 on motion of plaintiffs for summary judgment and motion of defendant to dismiss, and after hearing argument by respective counsel and considering the pleadings, the Court GRANTED defendant's motion to dismiss, and dismissed plaintiffs' motion for summary judgment as MOOT.

ACCORDINGLY:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant, THE COMMISSIONER OF INTERNAL REVENUE and against plaintiffs, ROBERT M. ROSE, M. D. and DORIS D. ROSE, dismissing said plaintiffs' complaint at their costs.

New Orleans, Louisiana, this 7th day of April, 1972.

(signed) Benjamin W. Reisch,
Clerk

Approved as to Form:

R Beer West

UNITED STATES DISTRICT JUDGE

Filed: Apr 7, 3:43 P. M. '72.

APPENDIX A

CIVIL DOCKET
UNITED STATES DISTRICT COURT

H 72-0165

Jury demand date:

Title of Case	JURY	Attorneys
ROBERT M. ROSE, M. D. and DORIS D. ROSE		For Plaintiff: Robert M. Rose, M. D. Pro Se 4440 Magnolia St. NOLA 70115 Office 891 8987 Home 833 3509
VS		
THE COMMISSIONER OF INTERNAL REVENUE		For defendant: Wood Sparks, Dept. of Justice G. J. Gallinghouse, U. S. Atty., NOLA

WEDNESDAY, APRIL 5, 1972

MOTION OF PLAINTIFF FOR SUMMARY JUDGMENT and
MOTION OF DEFT. TO DISMISS. 10:00AM

Argument.

IT IS ORDERED that motion of defendant to dismiss for failure to state a claim upon which relief can be granted be, and the same is hereby, GRANTED.

Motion of plaintiff for summary judgment is hereby MOOT.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2094
Summary Calendar*

ROBERT M. ROSE, M.D. and
DORIS D. ROSE,
Plaintiffs-Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(February 26, 1973)

Before WISDOM, GODBOLD and RONEY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2094

ROBERT M. ROSE, M.D. and
DORIS D. ROSE,
Plaintiffs-Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,
Defendent-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Feb. 26, 1973, 5 Cir., 1973, ____ F.2d ____).

(May 21, 1973)

Before WISDOM, GODBOLD and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

The expression of Congress' intent involved is from the Report of the Committee on Finance, U.S. Senate, to accompany H. R. 8300.

> "Subsection (e) defines medical care to mean amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of diseases or for the purpose of affecting any structure or function of the body(including amounts paid for accident or health insurance), or for transportation primarily for and essential to medical care. The deduction permitted for "transportation primarily for and essential to medical care" clarifies existing law in that it specifically excludes deduction of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a patient must go to Florida in order to alleviate specific chronic ailments or to escape unfavorable climatic conditions which have proven injurious to the health of the taxpayer, and the travel is prescribed for reasons other than the general improvement of a patient's health, the cost of the patient's transportation to Florida would be deductible but not his living expenses while there. However, if a doctor prescribes an appendectomy and the taxpayer chose to go to Florida for the operation not even his transportation costs would be

deductible. The subsection is not intended otherwise to change the existing definitions of medical care, to deny the cost of ordinary ambulance transportation nor to deny the cost of food and lodging provided as part of a hospital bill." (emphasis added)

APPENDIX E

The Income Tax Regulation involved is sec. 1.213-1 par. (iv)(v).

"(iv) Expenses paid for transportation primarily for and essential to the rendition of the medical care are expenses paid for medical care. However, an amount allowable as a deduction for "transportation primarily for and essential to medical care" shall not include the cost of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a taxpayer go to a warm climate in order to alleviate a specific chronic ailment, the cost of meals and lodging while there would not be deductible. On the other hand, if the travel is undertaken merely for the general improvement of a taxpayer's health, neither the cost of transportation nor the cost of meals and lodging would be deductible. If a doctor prescribes an operation or other medical care, and the taxpayer chooses for

purely personal considerations to travel to another locality (such as a resort area) for the operation or the other medicare, neither the cost of transportation nor the cost of meals and lodging (except where paid as part of a hospital bill) is deductible. (emphasis added)

(v) The cost of in-patient hospital care (including the cost of meals and lodging therein) is an expenditure for medicare." ***

APPENDIX F

F.R.C.P. 56(e) is the Rule involved, and is appended as Appendix F.

"(e) Form of Affidavits: Further Testimony: Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment

is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."